Supreme Court, U.S.
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No. 98-1237

In the

Supreme Court of the United States

October Term 1998

GEORGE KIRSTEIN and JOY KIRSTEIN,

Petitioners,

-v-

PARKS CORPORATION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY TO BRIEF IN OPPOSITION

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4 pp

ARGUMENT

THE CONFLICT BETWEEN THE CIRCUITS IS OVER THE PROCEDURE NECESSARY TO SATISFY DUE PROCESS IN RULING ON DAUBERT ISSUES.

The record shows that the trial court did follow its gate keeper function pursuant to Daubert v. Merrill Dow Pharmaceuticals, 509 U.S.579, 589, 113 S.Ct.2786, 2794 (1993). However, it did this in an arbitrary fashion by declaring, without any support in the record, that the question of whether adhesive remover absorbs and then gradually releases vapor is a question of science. Mem.Op. App. at 19a This initial conclusion was the source of all criticisms the Court leveled against Nelson's opinion. This is because if the opinion was a matter of science, and Dr. Nelson was deemed not to be a scientist, then he could not possibly testify on the interaction of the two chemicals without using additional scientific evidence.

The Court's criticisms of Dr. Nelson, that he did not follow methodology that engineers use and did not testify that the adhesive's flammability was increased by its combination with the lacquer thinner, are unsupported by the record. The only testimony on the subject, is Dr. Nelson's testimony that it was not necessary to perform a review of the chemical properties based on a test because he was able to use the material safety data sheets. This procedure was of the same intellectual rigor required by his profession. App. at 18(a)

There were a lot of things that Nelson could have done, none of which were testified as being necessary. Interestingly, the respondent does not contest that the record was devoid of any witness stating that Nelson's opinion needed to be supplemented by chemical testing. This disjointed scatter-shot attack and disjointed scatter-shot analysis destroyed the

plaintiff's case without the plaintiff having a reasonable opportunity to respond. The Seventh Circuit acknowledged, "[t]he way the issue was presented comes close to sandbagging." App. at 8(a) The argument was raised in the briefs and was not raised through submission of issues of material fact which is required by local Rule 12 of the Northern District of Illinois. The Seventh Circuit roundly approved this way of disposing of expert witness issues and soundly rejected the procedure set forth in In Re Pac'l Railroad Yard PCB Litigation, 916 F.2d 829 (3d Cir. 1990), saying that "we . . . have, in fact, upheld a judge's sua sponte consideration of the admissibility of expert testimony." App. 4a This Court should insist on due process guidelines given the importance of expert testimony and the normal way expert testimony is presented to the Court, through F.R.Civ.P.26 disclosures.

Parties are entitled to fundamental due process when dispositive motions are ruled on in their cases. Rule 56 of the Federal Rule of Civil Procedure has extensive evidentiary and procedural guidelines. Most of the federal districts have enacted local rules which also state procedural methods of handling a dispositive motion. Here, the Seventh Circuit upheld the defendant's use of briefs to raise issues for the first time, even though the local rule required issues to be placed in statements of material facts. This should not be allowed to continue.

This Court, in Daubert, instructed the courts to rule on expert admissibility in extremely broad terms. The court asked federal district courts to be "gatekeepers" and to examine an expert's testimony by determining testability, publication, rate of error, and general acceptance in the community, 509 U.S. at 593, 595, 113 S.Ct. at 2796, 2798. It is time for this Court to go further and to establish standards for analyzing the broad Daubert questions. Can a district court sua sponte dismiss an expert? Should a district court rely on

matters outside of the record in determining what is scientific and what is not? Are a district court's criticisms of an expert, without any factual support from other experts, allowable? Should a specific motion under Daubert be filed, and should a FRE 104 hearing be held? If a court can dismiss an expert sua sponte, what kind of warning is available to the party proffering the expert?

The petitioners do not argue that there has to be a hearing in all cases. The petitioners do argue that a Daubert issue cannot be raised as part of multiple issues in a summary judgment motion. This creates a tremendous burden on the party proffering the expert. Not only does the party have to respond to a summary judgment motion on matters of law and fact relating to the merits of the case, but must also ensure that every statement the expert has made is testable, subject to peer review, has undergone testing and has been accepted by the scientific community. A summary judgment motion is too unfocused for this type of inquiry. The proper way to test an expert's qualifications and opinion is to file a specific motion excluding the expert testimony, stating in the motion the precise nature of the expert's failings. If the district court finds there are additional failings, outside of the party's submission, then the respondent should be given the opportunity to respond rather than to have the expert be summarily stricken. This procedure will ensure fundamental due process and a measure of justice. To hold otherwise will require the party proffering an expert to fully establish all of these factors in the party's Rule 26(a) disclosure. That will require large costs and time expenditures for both plaintiffs and defendants prior to any whisper of criticism of either the expert or his opinion.

CONCLUSION

For the reasons stated, the petitioners, George Kirstein and Joy Kirstein, respectfully request that the petition for writ of certiorari be granted.

Respectfully submitted,

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